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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVEN MCCURRY,) 1 CA-IC 10-0048
)
Petitioner,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules of
ARIZONA,) Civil Appellate Procedure)
)
Respondent,)
)
ADP. TOTALSOURCE 1, INC./M21/ACT)
MANAGEMENT,)
)
Respondent Employer,)
)
SPECIALTY RISK SERVICES,)
)
Respondent Carrier.)
)
_____)

Special Action - Industrial Commission

ICA Claim No. 20091-760379

Carrier Claim No. YLL91512C

Administrative Law Judge Joseph L. Moore

AWARD AFFIRMED

Barton L. Baker, Attorney at Law
by Barton L. Baker
Attorney for Petitioner

Yuma

Andrew Wade, Chief Counsel
The Industrial Commission of Arizona
Attorney for Respondent

Phoenix

Doherty & Venezia, P.C.
by Julie A. Doherty
Attorneys for Respondents Employer and Carrier

Phoenix

P O R T L E Y, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") Award and Decision Upon Review for a noncompensable claim. In this memorandum decision, we address whether the Administrative Law Judge ("ALJ") erred by finding the petitioner, Steven McCurry, not credible.¹ Because the record supports the ALJ's credibility determination, we affirm the Award.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10. When reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63

¹ McCurry raised an additional issue on appeal, which we address in a separate opinion filed contemporaneously with this memorandum decision.

P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

PROCEDURAL AND FACTUAL HISTORY

¶3 McCurry filed a workers' compensation claim, which was denied by his employer's insurance carrier. A hearing was requested, and testimony was taken from McCurry; the human resources manager, Connie Deppen; and the operations director, Erik Martinez.

¶4 During the hearing, McCurry testified that he was working at ACT Management ("ACT") in May 2009 as an operations manager.² In preparation for a sales competition on May 29,³ he went to a retail store during the work day and purchased food, beverages, and ice. As McCurry was throwing a bag of ice into his truck, he "heard a crack . . . and had excruciating pain" in his neck and arms, and a "splitting headache."

¶5 After the injury, McCurry sat in his truck for approximately twenty minutes in pain. Upon returning to work, he called for assistance to unload the items from his truck.

² McCurry's job duties involved supervising approximately seventy-five employees.

³ The injury date was disputed during the hearing. McCurry initially testified that the injury occurred on May 28, 2008, but on cross-examination conceded that the injury may have occurred on May 29. The ALJ resolved the dispute in favor of finding that the injury occurred on May 29.

Later that afternoon, McCurry testified that he told Deppen that he injured his neck. He also testified that he returned to work the next morning, May 29, and was greeted by Deppen who told him that she had an insurance claim number so that he could report his injury. McCurry left work early due to the pain and scheduled a doctor's appointment for the following week.

¶16 Additionally, McCurry testified that he had a history of neck problems. After feeling numbness and pain in his neck and arms in 2000, he sought medical attention. As a result, he received a cervical spinal fusion in 2002. After the fusion, McCurry testified that he did not have neck pain until August 2008. He again sought medical treatment, which resulted in another spinal fusion. McCurry testified that after the surgery he had no residual symptoms and was "100 percent" released by his doctor for work.

¶17 Deppen disputed that McCurry reported his injury to her on May 28 or 29. Instead, she testified that McCurry approached her on June 4, 2009, and told her that he had injured himself. She instructed McCurry to provide her with a written report of the injury, and he sent her an email later that day. Deppen reported the injury to the insurance carrier, and a claim number was generated at that time.

¶18 At the close of testimony, the parties stipulated that the only issue was McCurry's credibility and whether he injured his neck in the course of, and arising out of, employment. Following the hearing, the ALJ found McCurry not credible and entered an Award for a noncompensable claim. McCurry timely requested administrative review, but the Award was summarily affirmed. McCurry appealed.

DISCUSSION

¶19 McCurry asserts that the ALJ erred by finding him not credible. Specifically, he contends that conflicting testimony concerning the date of the injury is insufficient to support the ALJ's credibility determination.

¶110 The ALJ is responsible for weighing and resolving conflicts in the evidence. *Villanueva v. Indus. Comm'n*, 148 Ariz. 285, 288, 714 P.2d 455, 458 (App. 1985). Additionally, the ALJ "is the sole judge of witness credibility," *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984), because "[t]he credibility determination is beyond the limited role of the reviewing court." *Villanueva*, 148 Ariz. at 288, 714 P.2d at 458. The ALJ cannot reject evidence merely because the claimant is self-interested, and it is an abuse of discretion to reject the testimony of a self-interested witness that is corroborated by disinterested witnesses. *Ireland v.*

Indus. Comm'n, 91 Ariz. 136, 137-38, 370 P.2d 285, 286 (1962). But when the testimony of the claimant is "contradictory, inconsistent with other evidence, or directly impeached," the ALJ can reject the testimony. *Holding*, 139 Ariz. at 551, 679 P.2d at 574.

¶11 In the decision, the ALJ first found that McCurry had a long history of neck injuries that predated his employment. The ALJ repeated McCurry's testimony describing the injury. He then concluded that McCurry's testimony was "flatly contradicted" by Deppen's testimony. In addition, the ALJ found that McCurry had been counseled twice about job performance, most recently in May 2009.⁴ Finally, the ALJ stated that he had the opportunity to observe McCurry's, as well as the other two witnesses', tone of voice and readiness to answer questions. Based on his observations and the totality of the evidence, the ALJ found that McCurry's testimony that his injury occurred in the course of, and arising out of, employment was not credible. Because the ALJ's findings are supported by the record, he did not err by rejecting McCurry's testimony.

⁴ McCurry had made conflicting statements regarding the validity of the reports.

¶12 Here, McCurry had a history of recurring neck problems. As a result, he had two spinal fusions, one as recent as August 2008. Because there were no witnesses to the injury, McCurry had to credibly establish that his injury arose out of, and was in the course of, his employment. See *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, 12-13, ¶ 8, 90 P.3d 211, 213-14 (App. 2004). His credibility was at issue.

¶13 Given the conflicting testimony, the ALJ was entitled to exercise his discretion as the fact-finder and reject McCurry's testimony. See *Holding*, 139 Ariz. at 551, 679 P.2d at 574 (holding that an ALJ can reject testimony based on contradictions concerning collateral issues). McCurry, however, asserts that his testimony was corroborated by his doctor. The doctor's report provided that McCurry "had been doing quite well until he was throwing some items into the back of his truck." McCurry's doctor was not a witness to the injury. At its core, the report is simply the doctor repeating McCurry's recollection of the event. Moreover, the report does not establish that McCurry injured his neck while working for ACT. The ALJ, therefore, did not err in rejecting McCurry's testimony.

CONCLUSION

¶14 For all of the foregoing reasons, we affirm the Award.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP Judge

/s/

SHELDON H. WEISBERG, Judge